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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CLARA WATSON,

Petitioner,

v.

FORT WORTH BANK & TRUST,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT

The Equal Employment Advisory Council (EEAC or Council) respectfully submits this brief as amicus curiae in support of the Respondent. The parties' written consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary, nonprofit association organized to promote sound approaches to the elimination of employment discrimination. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations, which themselves have hundreds of employer members interested in the foregoing purposes. The Council's governing body is a Board of Directors composed of experts and specialists in equal employment opportunity. Their combined experience gives the Council a unique understanding of the practical, as well as the

legal, aspects of equal employment policies and requirements. The members of the Council are committed firmly to the principles of nondiscrimination and equal employment opportunity.

Substantially all of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, the statute involved herein. As a result, EEAC's members are vitally concerned about the specific issue before the Court in this case, whether a plaintiff may challenge a subjective promotion practice or procedure under the disparate impact theory of Title VII when the disparate treatment theory is more appropriately used. Most employment decisions involve the use of subjective criteria; relatively few are based on objective factors alone. EEAC's members are concerned that the application of the disparate impact theory to subjective criteria would effectively bar even their wholly legitimate use,[1] because the practical difficulties and costs of "validating" subjective criteria would make the employer's rebuttal burden under that theory virtually insurmountable in most instances. Accordingly, EEAC's members will be affected directly by the rule of law this Court adopts in deciding what is an appropriate cause of action under the disparate impact theory.

EEAC has filed amicus curiae briefs in numerous cases concerning the permissible applications of the disparate impact theory. In *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795 (5th Cir. 1982), the first federal circuit court case to address the issue, EEAC argued that employers are not barred by Title VII from using subjective

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[1] There is nothing inherently wrong with an employer's using some element of subjectivity in making employment decisions, as long as subjective criteria are applied in a nondiscriminatory manner. Merely because a practice or discriminatory criterion is subjective in nature does not mean that it is discriminatory *per se*. *Hill v. Seaboard Coast Line R.R. Co.*, 767 F.2d 771, 775 (11th Cir. 1985); *Wang v. Hoffman*, 694 F.2d 1146, 1148 (9th Cir. 1982); *Bauer v. Bailar*, 647 F.2d 1037, 1046 (10th Cir. 1981). *See* Argument II, *infra*, at pp. 18-23.

criteria in making promotion decisions, particularly where adequate safeguards exist to prevent the criteria from being applied discriminatorily. EEAC also filed an amicus brief in *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477 (9th Cir. 1987) (*en banc*), a case which held that the disparate impact analysis may be applied to Title VII claims involving subjective employment practices, but that plaintiffs must prove a causal connection between specific employment practices or criteria and a disparate impact upon a protected class. In addition, EEAC filed a brief in *Green v. USX Corp.*, Nos. 86-1554 & 86-1568 (3d Cir.) (decision pending), another case concerning whether the disparate impact analysis properly can be applied to discrimination claims arising from subjective employment practices.[2]

Finally, because of its interest in the types of proof required under the two theories, EEAC also has filed amicus curiae briefs with this Court concerning statistical and standard of proof issues under Title VII. *See, e.g., Bazemore v. Friday*, 106 S. Ct. 3000 (1986); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Connecticut v. Teal*, 457 U.S. 440 (1982); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

STATEMENT OF THE CASE

Clara Watson (Watson), a black former bank employee, sued Fort Worth Bank & Trust (the Bank), claiming that she was discriminated against in violation of Title VII, 42 U.S.C. § 2000e, *et seq.* and Section 1981,

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[2] The Council also filed an amicus brief in *American Federation of State, County, and Municipal Employees, AFL-CIO v. State of Washington*, 770 F.2d 1401 (9th Cir. 1985), and *Spaulding v. University of Washington*, 740 F.2d 686 (9th Cir.), *cert. denied*, 469 U.S. 1036 (1984), dealing with the question of whether the disparate impact theory may be used to challenge an employer's pay practices under the comparable worth theory.

42 U.S.C. § 1981. With regard to the issue of promotions, the issue relevant to this Court, Watson used both statistical and non-statistical evidence in an attempt to prove that she had applied for, but was improperly denied because of her race, four promotions to supervisory positions. The Bank countered that the supervisors making these promotion decisions had used some "fifty or a hundred" subjective criteria—such as personal judgment—in making the promotions, and that such judgments were not discriminatory. *See* Joint App. at 135.

The district court, after denying class claim status to Watson's allegations, ruled that she had failed to show that the Bank's articulated reasons were pretextual, and that she had presented "little or no evidence" of discrimination in any of the Bank's promotion decisions. C.A. No. 4-81-581-E (N.D. Tex. 1984) at 13. Analyzing Watson's claim as a disparate treatment case, the court found specifically that Richard Burt and Patricia Cullar, workers who were chosen for promotions over Watson, were more qualified than Watson because of their experience, performance evaluations, or near completion of a college degree. *Id.* at 8. Significantly, the district court then concluded that the promotion of Kevin Brown, the promotion most fervently challenged in the Petitioner's brief, was adequately explained because Brown's supervisor "regarded [him] highly" based on his supervisory experience, because Watson "was out on sick leave" when the position became available, and because Brown "got along" better than Watson with co-workers. *Id.* at 9.

The Fifth Circuit agreed that Watson's claim was properly analyzed "as an individual disparate treatment claim," 789 F.2d at 797, and that the district court's finding that the Bank did not intentionally discriminate on the basis of promotions was "not clearly erroneous." *Id.* at 799. Significantly, the Fifth Circuit held that Watson could not *also* use the less burdensome "disparate impact" theory, because "this Court's recent precedent establishes that a Title VII challenge to an allegedly discretionary promotion system is properly analyzed under

the disparate treatment model rather than the disparate impact model." *Id.* at 797.

SUMMARY OF ARGUMENT

For several reasons, the disparate impact theory of Title VII should not be applied to discrimination claims involving practices or criteria that are subjective in nature. First, application of the theory to these types of claims would conflict with the fundamental legal principles that distinguish disparate impact from disparate treatment analysis. Subjective employment criteria necessarily require the exercise of judgment by the employer, *McRae v. General Dynamics*, 774 F.2d 1171 (8th Cir. 1985), and thus are inherently based on intent. Therefore, only the disparate treatment theory, which focuses on "purposeful or intentional discrimination," *Massarsky v. General Motors Corp.*, 706 F.2d 111, 117 (3d Cir.), *cert. denied*, 464 U.S. 937 (1982), should be used to analyze such devices. Indeed, this Court consistently has applied *only* the treatment model when reviewing discrimination claims involving subjective selection devices, *see, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and numerous circuit courts have adopted that view, *see, e.g., Pouncy v. Prudential Insurance Co.*, 668 F.2d 795 (5th Cir. 1982).

Second, for practical reasons, the disparate impact theory is inappropriate for claims involving subjective practices or criteria. Title VII does not foreclose employers as a matter of law from using subjective criteria in making promotion decisions, particularly where adequate safeguards exist to prevent the criteria from being used discriminatorily. *E.g., Pouncy v. Prudential Insurance Co.*, 499 F. Supp. 427 (S.D. Tex. 1980) *aff'd*, 668 F.2d 795 (5th Cir. 1982). No Court has held that validation of subjective criteria constitutes such a safeguard. Indeed, validated procedures can result in substantial impact against blacks. Linn, "Ability Testing: Individual Differences, Prediction, and Differential Prediction," *Abil-*

ity Testing (National Academy of Sciences 1982). And using subjectivity to determine who is the "best qualified" candidate clearly is permissible under Title VII. *Johnson v. Transportation Agency of Santa Clara County*, 107 S. Ct. 1442, 1457 n.17 (1987). In fact, nothing in Title VII requires businesses to adopt the " 'best' hiring procedures" or requires an employer to "pursue . . . the course which would both enable [it] to achieve [its] own business goal *and* allow [it] to consider the *most* employment applications." *Furnco Construction Corp.*, 438 U.S. at 577-78 (emphasis in original). Moreover, as a practical matter, if plaintiffs are permitted to rely on the statistically oriented impact theory in attacking subjective practice, *any* showing of a statistical disparity sufficient to establish a *prima facie* case will inevitably lead to a finding of discrimination, because it is virtually impossible for an employer to show the "business necessity" of such practices by using statistical and other empirical validation methods. Thus, employers would face a costly and insurmountable rebuttal burden—a result that is especially unwarranted where, as here, the court finds that the employer did *not* act with discriminatory intent.

Finally, the arguments to the contrary advanced by Watson and the amicus American Psychological Association—that subjective criteria can and should be validated—are not persuasive. First, the technical literature simply does not support the proposition that promotion criteria can be validated in the same meaningful way as objective criteria. In fact, a close examination of the technical standards, cited by the APA as the "most authoritative source" for its arguments, reveals they do not even apply to the facts presented herein. Just as importantly, the attempted "validation" of subjective criteria—and even the sole use by employers of objective criteria—will still have to be examined for the existence of discriminatory application, a function already served by the treatment theory.

ARGUMENT

I. THIS COURT SHOULD NOT APPLY THE DISPARATE IMPACT THEORY TO CLAIMS INVOLVING SUBJECTIVE EMPLOYMENT PRACTICES OR CRITERIA, BECAUSE THE DISPARATE TREATMENT THEORY IS UNIQUELY SUITED TO SUCH CLAIMS

As shown below, the Fifth Circuit properly analyzed Watson's claim under the treatment theory, because she challenged hiring criteria that are subjective in nature. Since it is clear that only the disparate treatment theory, not the disparate impact theory, should be used when subjective practices or criteria are challenged, EEAC urges that the decision of the court below be affirmed.

A. Subjective Practices, Such As The Promotions Made By The Supervisors In This Case, Are Based Upon The Intent And Judgment Of The Persons Applying Them

The starting point for determining which theory of Title VII is appropriate when "subjective" practices or criteria are involved is a clear understanding of the nature of such a practice or criterion. Here Watson concedes that the Bank's promotion decisions were "purely subjective," *see* Brief for the Petitioner at 6, 11, but for purposes of analysis, it is important to distinguish the two.

The Second Circuit has described a "subjective decision making process" as one that is not exclusively comprised of "quantifiable or objectively verifiable selection criteria which are mechanically applied . . ." *Zahorik v. Cornell University*, 729 F.2d 85, 95 (2d Cir. 1984). The Eighth Circuit has observed that "[a] subjective personnel procedure, by definition, functions not solely through facially objective measures of ability, but employs judgment and intuition in conjunction with objective measures, such as education and demonstrated skills, to achieve its ends." *McRae v. General Dynamics*, 774 F.2d 1171 (unpublished slip op. at 4) (8th Cir. 1985), *quoted in Emmanuel v. Marsh*, 628 F. Supp. 564, 569 (E.D. Mo. 1986) (emphasis

added), *aff'd*, *Paige v. Marsh*, No. 86-1282 (slip op.; available on Lexis) (8th Cir. Feb. 13, 1987); *see also* 3 A. Larson & L. Larson, *Employment Discrimination* § 76.34 at 15-87 to 15-88 (When there is discretionary decision-making, "there is simply no neutral factor involved . . . what is going on is an ad hoc decision process in which a subjective judgment is being made about an individual"). In short, a subjective employment practice or criterion is inherently based on the judgment, the motivation, the state of mind, and the intent of the person applying it.

B. The Burdens Of Proof Under The Disparate Treatment Theory Properly Focus Upon Alleged Intentional Discrimination In Subjective Practices, While The Burdens Under The Disparate Impact Theory Are Most Suitable For Claims Involving The Discriminatory Effect Of Facially Neutral Employment Practices

To attempt to use the impact theory under the facts presented herein would improperly destroy the clear distinction between that theory and the disparate treatment theory. That clear and sensible distinction is apparent in the unique focus, and in the contrasting burdens of proof, under the two theories.

Disparate treatment, the theory Watson properly attempted to use initially, is concerned with those situations where an employer "simply treats some people less favorably than others *because of* race, color, religion, sex, or national origin." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (emphasis added). Proof of discriminatory motive is the central inquiry. *Id.* Disparate impact, on the other hand, concerns specific "practices, procedures or tests," *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971), "that are facially neutral in their treatment of different groups, but that in fact fall more harshly on one group than another," *Teamsters*, 431 U.S. at 335 n.15. Proof of discriminatory motive is not required. *Id.* Thus, the central focus of the disparate treatment theory is the employer's

intent, whereas the impact theory concerns the possible discriminatory effect of a seemingly neutral employment practice or criterion.

This distinction in focus is reflected in the difference in the burdens of proof under each theory. Under disparate treatment, the concern with intent is reflected in the *prima facie* requirement that the plaintiff satisfy the four requirements established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973),[3] or otherwise produce evidence "adequate to create an inference that an employment decision was *based on* a discriminatory criterion illegal under the Act," *Teamsters*, 431 U.S. at 358 (1977) (emphasis added). Similarly, the employer's rebuttal burden under disparate treatment to "articulate some legitimate, *nondiscriminatory reason*" for a challenged action, *McDonnell Douglas*, 411 U.S. at 802 (emphasis added), reflects a concern with intent.

In contrast, disparate impact's focus on the discriminatory effect of specific employment devices is revealed in the *prima facie* requirement that the plaintiff prove that a "facially neutral employment practice" has caused a significantly discriminatory impact on a protected class of employees. *Connecticut v. Teal*, 457 U.S. 440, 446 (1982). As for the rebuttal burden, the employer must show a "business necessity" for the challenged practice or criterion, *Griggs*, 401 U.S. at 431 (1971), or that it is otherwise "job related," *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). This, too, reflects the

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[3] *McDonnell Douglas* requires the plaintiff to show "(1) that he belongs to a [protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802. These four requirements are not an inflexible formula, but "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

impact theory's focus on neutral or objective, not intentional or subjective, devices.[4]

Clearly, Watson did not point to a "facially neutral employment practice," *Teal*, 457 U.S. at 446, the threshold requirement for establishing disparate impact. Rather, Watson claimed the Bank's promotion decisions were "based on a discriminatory criterion," *Teamsters*, 431 U.S. at 358, the classic disparate treatment focus. Moreover, Watson did not point to the employment practice that *caused* the discriminatory impact, *Dothard v. Rawlinson*, 433 U.S. 321, 328-29 (1977); she failed to isolate which practice out of the "fifty or a hundred" led to the alleged discrimination. Thus, as properly analyzed by the Fifth Circuit, the disparate treatment theory, which focuses on intent, is the only theory that is logically applicable to Watson's claim in this case.[5] Accordingly,

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[4] As explained fully in n.18, *infra*, statistics can be used to prove and rebut allegation of discrimination under either theory. In addition, both theories permit the plaintiff to show "pretext" if the employer satisfies the rebuttal burden. Under treatment analysis, to show pretext the plaintiff must prove that the proffered reasons for the challenged action were not the true reasons and that the true reasons were intentionally discriminatory. *McDonnell Douglas*, 411 U.S. at 804-05. Under impact analysis, pretext is shown by demonstrating that other practices or criteria without a discriminatory effect would meet the employer's needs equally well. *Albemarle Paper*, 422 U.S. at 425. Again, the burdens match the basic focus of each theory.

[5] Although this Court has noted that the same set of facts may sometimes give rise to the application of both theories, Watson failed to allege such facts herein. This Court stated in *Teamsters*, 431 U.S. at 335 n.15 that "[e]ither [the treatment or impact] theory may, of course, be applied to a particular set of facts." Typically, this would occur where an objective selection criterion results in a racial disparity that is statistically significant. Under such a scenario, a plaintiff could proceed under both theories, alleging that the employer used the objective criterion to effectuate a discriminatory intent. It should not, however, be mistakenly inferred from the applicability of both theories of liability to a particular set of facts that *either* theory can apply to *any and all* sets of facts. As shown in Argument IB above, the two theories, even where applied to the same set of facts, serve completely

the Fifth Circuit properly declined to rely also upon the disparate impact theory.

C. As Recognized In The Opinions Of This And Other Courts, Because Discriminatory Intent Is The Central Focus Of The Treatment Theory, And Because Subjective Practices Are Inherently Intent-Based, Only The Treatment Theory Should Be Used To Analyze Claims That Subjective Employment Practices Are Discriminatory

1. *Because Subjective Practices Are Intent-Based, This Court Has Consistently Applied The Disparate Treatment Theory To Determine Whether Such Practices Violate Title VII*

As shown above, because subjective practices, such as the promotion decisions made by supervisors in this case, are intent-based, the disparate treatment theory is uniquely suited to analyzing such practices. This Court, in fact, has consistently applied only the treatment model when reviewing discrimination claims involving subjective selection practices or criteria. The underlying reason, of course, is that "[p]roof of discriminatory motive is critical" under the treatment theory. *Teamsters*, 431 U.S. at 335 n.15.

This Court first adopted the impact theory in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), as a judicial gloss on Section 703(a)(2) of Title VII.[6] *Griggs* held that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discrimi-

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different roles, and function differently in the fulfillment of Title VII's policies.

[6] Section 703(a)(2) provides:

> It shall be an unlawful employment practice for an employer— * * * to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(2) (1981).

natory employment practices." 401 U.S. at 430. The "practices, procedures or tests" at issue in *Griggs* were requirements for a high school education and a passing score on a standardized general intelligence test. The Court found those requirements to be in violation of Title VII because they operated to exclude blacks at a disproportionately high rate, and were insufficiently related to the jobs for which they were used. *Id.* at 431-34.

In the cases decided after *Griggs*, this Court has interpreted Section 703(a)(2) to prohibit facially neutral employment practices or criteria (like the high school diploma and test score in *Griggs*) that operate to discriminate against protected classes of employees. Unlike the "subjective" decisions made herein, this Court's application of the disparate impact analysis has been limited to the narrow context of facially neutral practices or criteria. For example, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), applied the impact theory to employment "tests" that "select[ed] applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Id.* at 425. Again, in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), this Court relied on the impact theory in reviewing a rule that excluded women from a disability plan based on pregnancy. In addition, *Dothard v. Rawlinson*, 433 U.S. 321 (1977), presented the Court with height and weight criteria that adversely affected women and could not be shown to have a "business necessity." The Court recognized that in dealing with such "facially neutral qualification standards" impact analysis should be applied, and emphasized that a *prima facie* case is shown under the impact theory by demonstrating that the particular criteria in question actually cause the selection of applicants in a discriminatory manner. *Id.* at 328-29.[7]

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[7] *See also Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (impact analysis applied to rule denying accumulated seniority to employees returning to work after pregnancy); *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979) (impact theory

In stark contrast to these "impact" cases, this Court's "treatment" cases have analyzed a different type of employment practice: subjective decisions. For example, in *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973), this Court contrasted a subjective decision to dismiss an employee for misconduct with the types of objective devices that were at issue in *Griggs*. The Court noted that *Griggs*:

> *dealt with standardized testing devices* which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions . . . *Respondent, however, appears in different clothing . . .*[*His employer*] *does not seek his exclusion on the basis of a testing device* which overstates what is necessary for competent performance, or through some sweeping disqualification . . .

411 U.S. at 806 (emphasis added). This Court then vacated the lower court decision, which had applied the *Griggs* requirement of "job-relatedness" to the employer's reasons for the subjective dismissal decision. *Id.* at 805-06.

Significantly, in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), this Court also expressly contrasted devices like those at issue in *Griggs* with subjective practices or criteria. The plaintiffs in *Furnco* challenged practices by which the employer hired only persons he considered to be experienced and competent or who were referred to him as similarly skilled. The Court refused to apply the impact theory, noting that the case "*did not involve employment tests* . . . or particularized requirements such as . . . height and weight specifications . . ." *Id.* at 575 n.7 (emphasis added). Justice Marshall, after distinguishing the treatment theory from the impact

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used to review anti-narcotics rule); *Connecticut v. Teal*, 457 U.S. 440, 446 (1982) (in applying impact theory to analyze a written test used to determine eligibility for promotion, the Court emphasized that that theory focuses on "practices, procedures, or tests." *Id.* at 448).

theory, dissented "from the Court's apparent decision . . . to foreclose on remand further litigation on the *Griggs* question of whether [the employer's] hiring practices had a disparate impact." *Id.* at 583 (Marshall, J., concurring in part and dissenting in part). *See Hazelwood School District v. United States*, 433 U.S. 299 (1977) (applying disparate treatment analysis to plaintiff's attack on subjective hiring procedures); and *Teamsters*, 431 U.S. 324 (applying treatment analysis to challenge of subjective hiring and promotion decisions).

Accordingly, it is clear that while this Court has never expressly held that the impact theory is unavailable for challenges to subjective practices, it has carefully guarded the distinction between the disparate impact and the disparate treatment theories of Title VII. Consistently, this Court has applied disparate impact *only* to claims challenging facially neutral employment practices or criteria that adversely affect a protected class of employees. Moreover, the Court has explicitly distinguished such cases from those in which subjective practices or criteria, like those involved herein, are challenged. Accordingly, this Court should uphold its prior decisions, and thereby affirm the decision by the Fifth Circuit below.

2. *Numerous Reasoned Decisions By Courts Of Appeals Also Have Recognized The Propriety Of Using Only The Treatment Theory To Analyze Subjective Employment Decisions, And Other Courts Have Required Plaintiffs To Prove Causation At A Minimum*

Numerous circuit courts, including the Fifth Circuit below, also have recognized that claims involving subjective practices or criteria should be analyzed under the disparate treatment theory, not the impact theory. For example, the Fifth Circuit in *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795 (5th Cir. 1982), addressing for the first time whether the impact analysis should be applied to a plaintiff's wide-ranging attack on multiple

employment practice or criteria, decided that the disparate impact theory is inappropriate for such an attack. In doing so, the court held that the theory "applies only when an employer has instituted a specific procedure . . . that can be shown to have a causal connection to a class based imbalance in the work force," 668 F.2d at 800. Rather, only "facially neutral" practices or criteria are amenable to the required showing of a causal connection. *Id.* at 801. As if foreshadowing the facts presented herein, the court in *Pouncy* explained:

> *None of the three Prudential "employment practices" singled out by the appellant*—the failure to post job openings, the use of a level system, and *evaluating employees with subjective criteria—are akin to the "facially neutral employment practices" the disparate impact model was designed to test.* Unlike educational requirements, aptitude tests, and the like, *the practices identified by Pouncy are not selection procedures to which the disparate impact model traditionally has applied.* See 3 A. Larson & L. Larson, Employment Discrimination § 73.00 (1981 & 1981 Supp.).

Id. (emphasis added).[8]

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[8] Other Fifth Circuit cases agree. *See Trevino v. Holly Sugar Corp.*, 811 F.2d 896, 902 (5th Cir. 1987) ("challenges to employment practices that rely on subjective selection criteria must be analyzed under the disparate treatment theory of discrimination, which requires a finding of intentional discrimination"); *Cunningham v. Housing Auth. of City of Opelousas*, 764 F.2d 1097, 1099 (5th Cir.), *cert. denied*, 106 S.Ct. 530 (1985), *quoting Walls v. Mississippi State Dept. of Public Welfare*, 730 F.2d 306, 321-22 (5th Cir. 1984) ("The use of subjective criteria to evaluate employees in hiring is analyzed, not under the disparate *impact* model, but instead under the disparate *treatment* model."); *Carroll v. Sears, Roebuck & Co., Inc.*, 708 F.2d 183, 188 (5th Cir. 1983) ("The use of subjective criteria . . . is not within the category of facially neutral procedures to which the disparate impact model is applied."); *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 817 (5th Cir.) ("Travenol's interviewing cannot be viewed as a neutral practice with a disparate effect thus subject to *Griggs* . . ."), *cert. denied*, 459 U.S. 1038 (1982). *But c.f. Page v. United States Industries, Inc.*, 726 F.2d 1038, 1045-46 (5th Cir. 1984) (disparate

Three other circuits agree with the Fifth. The Second Circuit, in *Zahorik v. Cornell University*, 729 F.2d 85, 95 (2d Cir. 1984), has held that "The disparate impact theory has been used mainly in the context of quantifiable or objectively verifiable selection criteria which are mechanically applied and have consequences roughly equivalent to results obtaining under systematic discrimination." *See Rossini v. Ogilvy & Mather, Inc.*, No. 85-7776 (2d Cir. Aug. 14, 1986). In addition, the Fourth Circuit, in *Brewster v. Barnes*, 788 F.2d 985, 993 (4th Cir. 1986), recently held that a plaintiff's challenge to subjective employment practices brought under the impact theory should have been brought under the disparate treatment theory. *See EEOC v. Federal Reserve Bank*, 698 F.2d 633, 638-639 (4th Cir. 1983), *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984); *Stastny v. Southern Bell Telephone & Telegraph Co.*, 628 F.2d 267, 274, n.10 (4th Cir. 1980). And the Eighth Circuit, in *Paige v. Marsh*, No. 86-1282 (slip op; available on Lexis) (8th Cir. Feb. 13, 1987), recently elucidated the "less than clear" case law in that circuit,[9] noting that "a disparate impact claim may not

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treatment and disparate impact theories used to analyze "subjective promotional system").

[9] The Eighth Circuit in *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1132-1133 n.6 (8th Cir.), *cert. denied*, 454 U.S. 969 (1981) previously held that the disparate impact theory is not available to challenge a subjective decision-making process. *See Harris v. Ford Motor Co.*, 651 F.2d 609, 611 (8th Cir. 1981) ("A subjective decision-making system . . . is not the type of practice outlawed under *Griggs* and cannot alone form the foundation for a discriminatory impact case."); and *Talley v. United States Postal Service*, 720 F.2d 505, 507 (8th Cir. 1983), *cert. denied*, 466 U.S. 952 (1984) (same). While the Court in *Gilbert v. City of Little Rock*, 722 F.2d 1390, 1397-1398 (8th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984) allowed the plaintiff in that case to use the disparate impact theory without identifying an objective, neutral employment practice, *Gilbert* did not even refer to the Eighth Circuit's prior decisions in *Taylor*, *Harris* and *Talley*, indicating that the case may have been decided without the benefit of complete briefing. At any rate, the Eighth Circuit has now sided with the Bank herein.

be based on subjective evaluation and promotion procedures." [10]

Two other circuits, the Seventh and Tenth, have both issued opinions that support the Bank's position that only the treatment theory should be used to analyze subjective practices. While aberrant decisions in these two circuits have resulted in a possible split between panels, and thus *dicta* that appear at first glance to be citable for the propositions advanced by Watson, these cases are not necessarily in conflict with the arguments made by the Bank herein.[11]

Obviously, this issue has not been settled in the circuits. But it is also clear that the law in four circuits—the Second, Fourth, Fifth and Eighth—directly supports

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[10] While a decision in one other circuit, the Third, is currently pending, *Green v. USX Corp.*, Nos. 86-1554 & 85-1568, that circuit recently completed oral arguments. Previously, however, the court has observed in *Massarsky v. General Motors Corp.*, that "[a] plaintiff alleging disparate treatment . . . bears the ultimate burden of persuading the jury that his treatment was 'caused by *purposeful or intentional discrimination*'" 706 F.2d 111, 117 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983), *quoting Smithers v. Bailar*, 629 F.2d 892, 898 (3d Cir. 1980) (emphasis added). The court further stated that plaintiffs may invoke the treatment model where the employer's treatment of the employee has been "expressly race-based or sex-based," while the disparate impact theory "applies when the employer's adverse action resulted *not from any discriminatory motive* but simply from application of *facially neutral criteria* that are alleged to have a disproportionate impact on members of the protected class." *Id.* (emphasis added). *See also Croker v. Boeing Co.*, 662 F.2d 975, 991 (3d Cir. 1981) (characterizing the impact theory as applicable to "practices that are facially neutral"). By ruling out the impact theory whenever motive is involved, the court essentially adopted the position that subjective practices or criteria (which necessarily involve motive) should be analyzed only under the disparate treatment model, not the impact model.

[11] For example, while *Bauer v. Bailar*, 647 F.2d 1037, 1043 (10th Cir. 1981), applied the disparate impact theory to subjective hiring and promotion decisions, the court in that case considered it important that the selection decisions were comprised of both subjective and objective hiring components. *Bauer* is thus clearly distinguishable from the case at bar; here the plaintiffs *concede* that the decisions are subjective.

the Bank's position in this case, and that three more circuits have issued recent decisions that point strongly in the same direction.[12] Even the Ninth Circuit's recent decision in *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987) (*en banc*), held that plaintiffs must prove a "causal connection" between challenged practices and their alleged impact. *Id.* at 1482.[13] *See Peters v. Lieuallen*, 746 F.2d 1390, 1392 (9th Cir. 1984) (cited in *Atonio*).[14] As a result, many reasoned decisions in the courts of appeals lend persuasive support to this Court's clear distinction between the treatment and impact theories. Accordingly, this Court should affirm the decision of the Fifth Circuit below.

II. THIS COURT SHOULD NOT APPLY THE DISPARATE IMPACT THEORY TO ANALYZE SUBJECTIVE EMPLOYMENT PRACTICES BECAUSE, AS A PRACTICAL MATTER, SUCH AN APPLICATION WOULD REQUIRE INORDINATE EXPENDITURE UPON VALIDATION OF EMPLOYMENT CRITERIA, IMPOSE AN INSURMOUNTABLE REBUTTAL BURDEN UPON EMPLOYERS, AND IMPROPERLY ELIMINATE THE LEGITIMATE USE OF SUBJECTIVITY IN EMPLOYMENT DECISIONS

As discussed in Argument IB above, the disparate impact theory requires plaintiffs to show that a "facially

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[12] Clearly, therefore, the statement by the amicus American Civil Liberties Union that "[o]nly one Circuit, the Second, has refused to apply disparate impact analysis to subjective criteria," Br. at 30 n.32, is incorrect.

[13] To the extent it is unclear in a particular case whether a criterion or procedure is objective or subjective, EEAC contends that in any event, it is an essential prerequisite that the plaintiff establish a causal connection between a particular criterion and a workforce imbalance before the impact theory may be used.

[14] Of course, other circuits have held that subjective decisions may be challenged under the impact theory. *See Griffin v. Carlin*, 755 F.2d 1516, 1524-1525 (11th Cir. 1985); *Segar v. Smith*, 738 F.2d 1249, 1270-1272, 1288 n.4 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985); and *Rowe v. Cleveland Pneumatic Co. Numerical Control*, 690 F.2d 88, 93 (6th Cir. 1982). These cases are wrong and should be overruled.

neutral" employment practice has a significantly discriminatory impact upon a protected class, *Teal*, 457 U.S. at 446. To correspond with that exacting requirement, when a plaintiff makes a *prima facie* showing of disparate impact, the employer bears the heavier burden of proving that the challenged practice or criterion has a "business necessity," *Griggs*, 401 U.S. at 431, or that it is "job related," *Albemarle Paper Co.*, 422 U.S. at 425. Typically, as explained fully in Argument III below, the employer proves "business necessity" by "validating" the challenged device, or showing by statistical or other empirical proof that it measures factors which are necessary for satisfactory job performance.

The use of subjective criteria is not illegal *per se* under Title VII, *Rogers v. International Paper Co.*, 510 F.2d 1340, 1345 (8th Cir. 1975), and an employer's decisions properly may be based on subjective factors, *see, e.g., Hamilton v. General Motors Corp.*, 606 F.2d 576, 580 (5th Cir. 1979). Requiring employers to prove business necessity to justify subjective practices, however, will, in effect, condemn all such criteria—regardless of how they are used. Proof of "business necessity" will require an inordinate expenditure for validation devices, a substantial loss of discretion, and a considerable restructuring of most employment decision making, if the result advocated by Watson is adopted by this Court. These expenditures by employers are not "minimal" as argued by Watson and her amici. Rather, professional industrial psychologists usually must be hired to undertake the studies because most companies do not possess the expertise to do their own.[15] In fact, the measurement of

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[15] In this regard, there are 2500 American Psychological Association (APA) members who belong to its division of Industrial and Organizational Psychology, but only 1500 of its members belong to its Division of Evaluation and Measurement. APA Brief at 1. Since the *Uniform Guidelines on Employee Selection Procedures* cover some 666,000 employers (627,000 private and 39,000 public), see Appendix, each Division of Evaluation and Measurement member will have to perform evaluations for, on average, 444 employers. Clearly, this is an impossible task, making incredible the assurances

one simple characteristic reportedly costs up to $100,000, according to a 1979 study. Gwartney, Asher, Haworth & Haworth, *Statistics, the Law and Title VII: An Economist's View*, 54 Notre Dame Law. 633, 643. By simple extrapolation, it is evident that the measurement of *multiple* characteristics, now some *8 years* after the Gwartney study, will cost far more, a burden that will be especially great upon small employers. And just because the federal government can afford to commission such a study, a fact pointed out by the NAACP Legal Defense Fund in its brief at 29, does not mean that smaller employers should be required to shoulder a similar burden. Indeed, even large employers have found it increasingly difficult to meet the validation requirements found in the technical literature. *See* Argument III, *infra*.[16]

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by the APA that the studies can be performed for *all* employment decisions, and that the standards can be applied with a sufficient degree of reliability to make the impact theory a viable method of analysis for the 49,000 occupational titles recognized by the U.S. Bureau of the Census. *See* Alphabetical Index of Industries and Occupations (1980) at III.

[16] In April 1976, David L. Rose, Chief of the Employment Section, Civil Rights Division, Department of Justice, stated in a memorandum to the Deputy Attorney General:

> Under the present [1970] EEOC *Guidelines* few employers are able to show the validity of *any* of their selection procedures, and the risk of their being held unlawful is high. Since not only tests, but all other procedures must be validated, *the thrust of the present guidelines is to place almost all test users in a posture of noncompliance*; to give great discretion to enforcement personnel to determine who would be prosecuted; and to set aside objective selection procedures in favor of numerical hiring.

122 Cong. Rec. 22590 (daily ed. July, 1976) (Emphasis supplied). *See* Sharf, "Personnel Testing and the Law," *Personnel Management* (K. Rowland & J. Ferris, eds.) (1982). The 1970 EEOC Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333, referred to in the memorandum, subsequently were supplanted by the 1978 *Uniform Guidelines*. Former EEOC staff psychologist James C. Sharf, has commented, however, that: "While the *Uniform Guidelines* offer at least a choice between validation strategies that the 1970 EEOC *Guidelines* did not, the documentation requirements now add considerably to the likelihood that a full compliance review will find an employer to be in noncompliance . . ." Sharf at 178.

Subjective practices, as shown in Argument III below, are not easily susceptible to the validation process because they are judgmental and nonquantifiable in nature. *See McDonnell Douglas*, 411 U.S. at 802, 806 n.21 (subjective processes involve "predictive evaluation[s]" that are "resistant to empirical proof"); A Larson & L. Larson, *supra*, § 76.34 at 15-87 to 15-88. As a result, employers would have a virtually impossible burden in showing that a subjective practice or criterion has a business necessity—a disadvantage that is especially unwarranted where (as here) a court finds that the employer did *not* act with discriminatory intent.[17]

Because of these practical realities, if plaintiffs were permitted to rely on the statistically oriented impact theory in attacking subjective devices, any showing of a statistical disparity sufficient to establish a *prima facie* case would inevitably lead to a finding of discrimination. Intent "would become a largely discarded element" of the disparate treatment theory, and "the distinction between disparate impact and disparate treatment would diminish." *Griffin v. Bd. of Regents of Regency Universities*, 795 F.2d 1281, 1288 n.14 (7th Cir. 1986), *quoting Atonio v. Wards Cove Packing Co., Inc.*, 768 F.2d 1120, 1133 (1985), *en banc*, 810 F.2d 1477 (9th Cir. 1987).[18]

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[17] In addition, where a challenged practice or criterion is largely subjective, it is impossible to make a showing of causation, making the impact model's rebuttal burden even more impractical. One commentator has observed that "[a]pplying a disparate impact analysis to subjective decision making is troubling because statistics will not necessarily show that the subjective nature of the practice *caused* the racial or sex imbalance." Denis, *Subjective Decision Making: Does It Have a Place in the Employment Process?*, 11 Empl. Rel. L.J. 269, 277-78 (1985) (emphasis added). Causation cannot easily be shown in this context because a subjective practice or criterion is not easily "quantifiable or objectively verifiable," *Zahorik*, 729 F.2d at 95, but rather is based on intent. Thus, the only meaningful inquiry when analyzing a subjective practice is not causation, but what can be inferred about intent from the evidence.

[18] Watson and her *amici* rely on *Atonio* to argue that this Court should permit subjective criteria to be scrutinized under the impact theory. Otherwise, they argue, it will be impossible to prove

Moreover, as the Seventh Circuit in *Griffin* has recognized:

> Rather than becoming an irrelevant factor as envisioned, race (or sex, etc.) could then become an overriding factor in employment decisions. *Employers with work forces disproportionate to the minority representation in the labor force could then face the choice of either hiring by quota or defending their selection procedures against Title VII attack. We do not find such a result has been mandated* by Congress or through Supreme Court interpretation of Title VII. Therefore, practices and policies such as . . . subjective decision making, . . . which are not facially neutral, lend themselves far better to scrutiny for intentional discrimination.

795 F.2d at 1288 n.14 (emphasis supplied).[19]

Another practical effect of the result advocated by Watson would be the elimination of subjectivity in hiring

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intent that is hidden by a "routine adherence to past practices whose original purposes are undiscoverable." 810 F.2d at 1484. Such an argument, however, overlooks the fact that statistics of sufficient magnitude can still be used to infer intent under the treatment theory. *See Hazelwood*, 433 U.S. at 307. In fact, the Fifth Circuit below permitted Watson to do so, emphasizing that "the plethora of statistics which Watson introduced at trial" was still relevant to her allegations, both in "establishing a prima facie case of discrimination" and in "attempting to prove that the reasons proffered by the [Bank] for its action [were] either unworthy of credence or mere pretexts for discrimination." 798 F.2d at 798. But the court found "no indication in the record, nor [was there] any suggestion . . . by Watson . . . that the district court neglected to consider the statistical evidence presented by Watson in terms of evaluating the credibility of the Bank's proffered explanations for its promotion decisions." *Id.* at n.13.

[19] Clearly, Title VII does "not require employers . . . to use racial quotas or to grant preferential treatment to racial minorities in order to avoid being charged with unlawful discrimination," *Local 28 of Sheet Metal Workers v. EEOC*, 106 S.Ct. 3019, 3038 (1986). *See also Johnson v. Transportation Agency of Santa Clara County*, 107 S.Ct. 1442 (1987). However, if plaintiffs are permitted to rely on the disparate impact theory in attacking subjective practices or criteria, such a requirement may be the *de facto* result.

and promotion. But, clearly, Title VII does not (and *should* not) prohibit employers from using some element of subjectivity in making employment decisions, as long as subjective criteria are applied in a nondiscriminatory manner. As many courts have stressed, just because a practice or criterion is subjective does not mean that it is discriminatory *per se*. *Hill v. Seaboard Coast Line R.R. Co.*, 767 F.2d 771, 775 (11th Cir. 1985); *Wang v. Hoffman*, 694 F.2d 1146, 1148 (9th Cir. 1982); *Bauer v. Bailar*, 647 F.2d 1037, 1046 (10th Cir. 1981). Indeed, as this Court stated in *Johnson*:

> "[i]t is a standard tenet of personnel administration that there is rarely a single 'best qualified' person for a job. *An effective personnel system will bring before the selecting official several fully-qualified candidates* who each may possess different attributes which recommend them for selection. Especially where the job is an unexceptional, middle-level craft position, without the need for unique work experience or educational attainment and for which several well-qualified candidates are available, *final determinations as to which candidate is 'best qualified' are at best subjective.*"

107 S. Ct. at 1457 n.17, quoting Brief for American Society for Personnel Administration as Amicus Curiae at 9 (Emphasis added).

Thus, for practical reasons, Watson should not be permitted to use the disparate impact theory in her attack on the Bank's subjective promotion criteria.

III. THE UNIFORM GUIDELINES AND PROFESSIONAL STANDARDS DO NOT SUPPORT THE PROPOSITION THAT ALL SUBJECTIVE DECISIONS, SUCH AS THE PROMOTION DECISIONS MADE HEREIN, CAN AND SHOULD BE VALIDATED, AND THIS COURT SHOULD DECLINE TO SO RULE

A. Introduction

Watson and the amicus American Psychological Association (APA) claim that the technical standards and principles that have been developed by educational and

industrial psychologists for administering employee selection tests are fully applicable to the instant analysis. Specifically, the APA contends that the subjective criteria used by the supervisors herein to promote other employees instead of Watson should be judged against the procedures contained in the *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607 (1978) (*Uniform Guidelines*), the *Principles for the Validation and Use of Personnel Selection Procedures* (1987) (*Principles*), and the *Standards for Educational and Psychological Testing* (*Standards*) (1985).[20]

As shown below, however, the *Uniform Guidelines*, *Principles* and *Standards* fail to provide meaningful guidance to this Court's analysis of the instant case, because true validation of objective employee selection devices differs significantly from the so-called "validation" of subjective selection procedures or criteria. Moreover, even where subjective procedures *have* been validated does not mean they are reliable in predicting future job performance.[21]

B. Because The Uniform Guidelines And Professional Standards Provide Technical Assistance In The Administration Of Tests For Employee Selection, But Fail To Provide Meaningful Guidance In Assessing Many Promotion And Other Subjective Criteria, They Do Not Support The Proposition That All Subjective Decisions Can And Should Be Validated

In its brief, the APA states that industrial psychologists "routinely" validate "both objective devices such as

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[20] The *Uniform Guidelines*, *Principles* and *Standards* each serve a different purpose. The *Guidelines* presumably provide employee selection guidance that is consistent with Title VII and professional practice. The *Standards*, adopted by the APA and others, serve as a technical guide addressing a broad range of psychometric issues, one of which is employment. In contrast, the *Principles*, adopted by the Society for Industrial and Organizational Psychology, focus solely on the problems associated with test development and other employment decisions.

[21] Reliability means the extent to which a particular subjective characteristic would receive the same evaluation from several people. Ghiselli, *Theory of Psychological Measurement* 208 (1964).

standardized ability tests . . . and purely subjective . . . devices such as interviews, performance appraisal ratings, constructed performance tests, nonscored experience and biographical data intake sheets, and structured behavioral sample tests." APA Br. at 14. Conveniently, the APA then categorizes the "three selection devices" used by the Bank herein as "interviews, supervisor's ratings, and experience requirements," *id.* at 4,[22] and concludes that the Bank "den[ied] promotion to a member of a protected class" without applying "generally accepted professional standards," *id.* at 23, such as the *Uniform Guidelines*, *Principles*, and *Standards*.

The APA's characterization, however, of the Bank's promotion criteria as "selection devices" points dramatically to the fundamental flaw in its arguments. Certainly, the *Guidelines*, *Standards* and *Principles* provide meaningful assistance to educational and industrial psychologists who are administering standardized "tests" and reliable, structured "selection devices." But the decisions at issue herein are promotion decisions that are not based upon standardized "tests" or reliable, structured "selection devices," but rather upon criteria that are not readily quantifiable and, therefore of unknown reliability. In fact, the *Standards*, *Principles* and *Uniform Guidelines*, examined individually below, are not even helpful in analyzing the subjective promotion decisions made herein because each presumes the reliability of the "selection device," a presumption unwarranted in this case (and indeed in most selection decision making based on subjective criteria).

First, the APA's reliance upon the 1985 *Standards* in the promotion context is simply misplaced. In fact, the *Standards* themselves distinguish the true "selection de-

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[22] Clearly, the bank relied on many more criteria than the three identified by the APA. See District Court decision at 8-9. The creation by the APA of these three "convenient categories," therefore, amounts to little more than the setting up—and knocking down—of the "straw man."

cisions" that they were designed to address from "promotion decisions" such as those made herein:

> *Promotion decisions are distinguished from selection decisions* largely by the fact that the individual who is being considered for promotion has an established job performance record in the organization. Thus, the employer may know considerably more about that individual than is known about new applicants. *An employer will need to decide to what extent job performance information should be combined with test information.*

Id. at 59 (emphasis added). Moreover, it is clear that the *Standards* "were never intended to be, nor are they well suited to become, rules of law." Comment, *Courts, Psychologists, and the EEOC's Uniform Guidelines: An Analysis of Recent Trends Affecting Testing as a Means of Employee Selection*, 36 Emory L.J. 203, 218 (Winter 1987). Rather, the *Standards* contain their own "cautions" as follows:

> The *Standards is a technical guide that can be used as the basis for evaluating testing practices.* Evaluating the acceptability of a test or test application does not rest on the literal satisfaction of every primary standard in this document, and acceptability cannot be determined by using a checklist. *Specific circumstances affect the importance of individual standards. Individual standards should not be considered in isolation. Therefore, evaluation acceptability involves the following: professional judgment* that is based on a knowledge of behavioral science, psychometrics, and the professional field to which the tests apply; the degree to which the intent of this document has been satisfied by the test developer and user; the alternatives that are readily available; *and* research and experiential evidence regarding *feasibility.*

Standards at 2 (emphasis added). As explained, the *Standards* recognize that subjective criteria can not be quantified because they are inherently intent-based.

Inexplicably, the APA in its brief, calls these *Standards* "[t]he most authoritative source . . . to be applied to determine the technical adequacy of assessment devices, the appropriateness of specific applications of these devices, and the reasonableness of inferences based on the results of these devices. . . ." Br. at 6. However, the brief fails to point out that:

> The purpose of publishing the *Standards* is to provide criteria for the evaluation of tests, testing practices, and the effects of test use. Although the evaluation of the appropriateness of a test or application should depend heavily on professional judgment, the *Standards* can provide a *frame of reference* to assure that relevant issues are addressed. The *Standards does not attempt to assign precise responsibility for the satisfaction of individual standards. To do so would be difficult, especially since much work in testing is done by contractual arrangement.* However, all professional test developers, sponsors, publishers, and users should make reasonable efforts to observe the *Standards* and to encourage others to do so.

Standards at 2. Thus, given their limited function as merely a "frame of reference," *Standards* at 2, the APA's reliance upon these *Standards* as the "authoritative source" is clearly suspect.

Similarly, the *Principles*, by their very terms, are of limited assistance to the analysis herein. Significantly, the *Principles* declare that "there is no clear path to truth" in determining whether bias exists. *Principles* at 10. "A difference in criterion scores . . . could reflect bias in raters, equipment, or conditions, *or it might reflect genuine differences in performance.*" *Id.* (Emphasis added).

If bias is not measurable, or even readily recognizable, it is clear that there is no way to "validate" the types of criteria used by the Bank herein that will be of much use to employers or courts in determining whether a promotion system is discriminatory. From a legal point of view, the mere fact that there is a difference in the result of a selection device—even a patterned interview—

does not mean that the difference was a result of discrimination. Stated differently, the so-called validation of subjective criteria will not "eliminat[e] the most common nondiscriminatory reasons" for the employer's actions. *Burdine*, 450 U.S. at 254.

Clearly, therefore, the *Principles* may be helpful to industrial psychologists as "principles of good practice," *Principles* at 1, but they are obviously not appropriate as legal rules of minimum employer behavior. Furthermore, if literally applied, the *Standards* and the *Principles* would make the burden of defending unstructured appraisals substantially greater than that of defending standardized tests since *each* evaluator's decision making would have to be shown to be valid, whereas standardized testing does not treat each test administrator as a source of bias. *See Standards* at 16.

Similarly, the *Uniform Guidelines* provide little assistance in determining whether promotions and other truly subjective decisions are discriminatory. First, the language of the *Guidelines* mirrors the *Standards* in many respects, and were, in fact, established to be consistent with the 1974 *Standards*. *See* 29 C.F.R. § 1607.5(C). Of course, as shown above, the *Standards* clearly were not intended to serve as legal requirements, especially when dealing with promotion decisions. *See* 36 Emory L.J. at 251. Second, even though the *Guidelines* ostensibly apply to "any employment decision," 29 C.F.R. § 1607.2(B), the inability to eliminate bias and other human-error problems renders the *Guidelines* nearly valueless in measuring subjective criteria. Even the APA's brief, in its discussion of the methods by which subjective decisions theoretically can be "validated," Br. at 9-22, admits that bias can enter the validation process in many forms.[23]

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[23] The APA's brief, in explaining the many ways human judgment can enter the process, states as follows:

> Industrial psychologists and others who create a test or other selection procedure must choose the domain to be assessed, construct the items to which test takers will respond or select

Even if, for purposes of argument, the *Guidelines* are taken at face value—that they apply to "promotion" and other subjective decisions—such a bold assertion simply makes the *Guidelines* themselves overbroad. The APA treats the *Guidelines* as if they are substantive rules, entitled to great deference in this case.[25] But they are not. Rather, as the Second Circuit has stated, the *Guidelines* "are useful as a source of guidance, but they need not be adhered to in every detail as if they were substantive regulations." *Guardians Ass'n of New York City v. Civil Service*, 630 F.2d 79, 110 (2d Cir. 1980), *cert. denied*, 101 S.Ct. 3083 (1981). As one commentator stated:

> To demand in the Guidelines a higher level of test development and validation than is currently attainable is improper. It places virtually all employers in a posture of noncompliance and enables the en-

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the behaviors to be observed, develop scoring scales and norms so that results can be interpreted, prepare manuals, and most importantly, ensure that the instrument is psychometrically sound.

Id. at 9. The brief also states that the validity of any performance appraisals may be dependent upon "the race of the rater and ratee," *id.* at 18, and the "skill of the rater," *id.* at 20. Even the *Standards* themselves attempt to limit the effect of "[e]xpert judgment" when substantiating a claim of construct-related evidence. *Standards* at 61. Certainly potential bias renders this so-called validation little more than another human effort to keep discrimination out of the selection process—not the scientific, purely quantifiable, air-tight process claimed by the APA. Thus, the APA's own description of the *Standards* shows that individual judgment permeates their application. As we showed in Arguments IA and IB, such judgments are properly evaluated under the disparate treatment theory.

[25] In 1971, this Court in *Griggs* at 434 stated that EEOC's 1970 *Guidelines on Employee Selection Procedures*, 35 Fed. Reg. 12,333 (1970), *withdrawn*, 43 Fed. Reg. 38,312 (1978) were "entitled to great deference." Since then, courts have criticized the 1970 Guidelines, as well as their 1978 replacements, either as outdated or as unsupported by current interpretations of Title VII. *See, e.g., Washington v. Davis*, 426 U.S. 229 (1976) (Burger, C.J., dissenting). *See also*, Report by the U.S. General Accounting Office, *Uniform Guidelines on Employee Selection Should be Reviewed and Revised* (1982).

> forcement agencies to use the Guidelines as a litigation vehicle against even those employers who have instituted "state-of-the-art" selection procedures.

Potter, *Employee Selection: Legal and Practical Alternatives to Compliance and Litigation* at 6 (National Foundation for the Study of Equal Employment Policy, 2d ed. 1986).

Accordingly, it is clear that the *Guidelines*, *Principles* and *Standards* fail to provide meaningful guidance in analyzing whether promotions and many other subjective decisions have been made in a discriminatory manner, and they certainly do not support the APA's argument that all subjective decisions can and should be truly "validated." While a form of "validation," loosely defined, can be used in an attempt to restructure subjective criteria to make them more quantifiable (*i.e.*, the use of a "scored" interview in place of "impressions or feelings"), the validation procedures contained in the *Guidelines*, *Standards* and *Principles* clearly are not useful in resolving the issues before the Court in the instant case.

CONCLUSION

For the foregoing reasons, EEAC respectfully urges that the decision of the Fifth Circuit, disallowing the application of the disparate impact theory to the subjective promotion criteria at issue in this case, be affirmed.

Respectfully submitted,

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November 27, 1987

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APPENDIX

[SEAL]

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Washington, D.C. 20507

November 20, 1987

Garen Dodge
McGuiness & Williams
1015 15th Street, N.W.
Washington, D.C. 20005

Dear Mr. Dodge:

This letter is in response to the request for data on November 10, 1987.

- ☒ The data are enclosed.
- ☐ We substituted data which may be useful (see comments below).
- ☐ We are unable to fill your request in its entirety because

Comments:

If you need further assistance, please contact Clarice Bryce, at (202) 634-7062.

Sincerely,

/s/ Doris M. Werwie
DORIS M. WERWIE
Survey Division

RECORD MAINTENANCE REQUIREMENTS

UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

Type of Employer	More than 100 Employees	Between 15 and 100 Employees
Private	45,000	582,000
State and Local Government	3,500	8,500
Elementary and Secondary Districts	5,000	9,000
Higher Education	3,000	—
Joint Apprentice Programs	—	5,000
Referral Unions	3,000	—
Federal Government	2,000	—
Total by Size Group	61,500	604,500
Total	666,000	

Employer and Employment Coverage

Uniform Guidelines on Employee Selection Procedures

Employment Size Ranges	Total Employers [1]	Total Employment (In Millions)
Total, 15 or more	666,000	71.2
15-99	604,500	29.0
100-249	27,600	4.1
250 or more	33,900	38.1

[1] Includes joint apprentice programs and referral unions.